KAHAR AK TONGAH

v.

PUBLIC PROSECUTOR

HIGH COURT BORNEO, KUCHING
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. KG. 7 OF 1991]
17 JUNE 1992

CRIMINAL PROCEDURE: *Accused charged with theft - Admissibility of cautioned statements - Burden of proving voluntariness on prosecution - Standard required - Beyond reasonable doubt - "Trial-within-a-trial" - Criminal Procedure Code, ss. 113(1)(a)(i), 457 and Evidence Act 1950 ss. 24, 28.*

The appellant was charged with the offence of house breaking by night, in order to the committing of theft, an offence under s. 457 of the Penal Code. He claimed trial at the conclusion of six months imprisonment and a fine of RM2,500. He appealed against the conviction and sentence.

The case for the prosecution had rested solely on a cautioned statement of the appellant. The appellant challenged its admissibility alleging assault on him by police personnel. The appellant also contended that he was denied legal representation at the trial in the lower Court.

Held:

[1] The learned Magistrate has misdirected himself on the burden of proving that the cautioned statement or a confession was made voluntarily.

[2] As a matter of law, an accused may be convicted on his own confession even if it is retracted provided the Court is satisfied beyond reasonable doubt of its truth.

[Appeal allowed. Conviction quashed. Sentence set aside. Fine if paid, be refunded.]

Cases referred to:
PP v. Tanggaah [1972] 1 MLJ 207 ***(cit)***
Dato' Mokhtar bin Hashim v. PP [1983] CLJ (Rep) 101 ***(cit)***
Lim Sing Hiaw v. PP [1965] 1 MLJ 85 ***(cit)***
Chan Wei-Keung v. The Queen [1967] 2 WLR 553 ***(foll)***
Osman & Anor. v. PP [1967] 1 MLJ 137 ***(foll)***
Yap Sow Keong v. PP [1947] MLJ 90 ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 113(1)(a)(i)
Evidence Act 1950, s. 24, 28
Penal Code s. 457

For the appellant - Baru Bian; M/s. Baru Bian & Co.
For the respondent - Thomas Akin

JUDGMENT

Chong Siew Fai J:

The appellant was charged with the offence of house breaking by night, in order to committing of theft, an offence under s. 457 of the Penal Code. He claimed trial at the conclusion of which he was convicted and sentenced to 6 months' imprisonment and a fine of RM2,500.

Against the conviction and the sentence he now appeals.

The offence was alleged to have been committed on a day in the month of November 1987, at about 5 a.m. (but before the 14th). On 14 November 1987, John Ernest Nuda (PW1) discovered the crime. Articles to the total value of about RM2,745 were stolen. On 22 June 1988 the appellant was arrested and subsequently charged in Court.

The case for the prosecution rested solely on a cautioned statement of the appellant made on 28 June 1988. The appellant challenged its admissibility alleging assault on him by police personnel PW4 and PW5. At the conclusion of the proceedings held to decide its admissibility, the learned trial Magistrate ruled it admissible in evidence (Exh. P10A).

For the appellant it was contended that the appellant was denied of legal representation at the trial in the lower Court (grounds (a) and (c) of appeal). I am unable to find anything in the appeal record amounting to the learned trial Magistrate refusing the appellant to be legally represented. In my view it is a case of the learned trial Magistrate refusing adjournments.

According to the appeal record:

1. On 11 April 1990, when Counsel for the co-accused requested for adjournment, the appellant opposed. The trial was adjourned to 20 June 1990.
2. The trial proceeded on 20 June 1990.
3. In the afternoon of 21 June 1990, an advocate appeared for the appellant and sought adjournment on the ground that he was just engaged. He did not specifically state the length of adjournment required. The prosecution objected. The learned trial Magistrate refused the request stating, *inter alia*, and in my opinion quite justifiably, that the appellant had as early as 1988 to engage Counsel.
4. In the afternoon of 4 July 1990, Mr. Baru Bian appeared for the appellant and asked for adjournment on the ground that he was just engaged by the appellant. In the event the trial was postponed to the following day.

There is thus no question of refusing or depriving the appellant from being represented by Counsel of his choice. As rightly pointed out by the learned trial Magistrate, the appellant had ample time to engage Counsel. This is not a case where the appellant was not given a reasonable opportunity to obtain the service of Counsel. On the other hand, in cases where the accused has been given sufficient time to seek legal representation, if Counsel accepts a brief at the last minute, he should be prepared to proceed with the hearing or, at least, not complain in the event of request for adjournment, if applied for, being refused. Adjournment of trial is a matter of discretion for the Court, *PP v. Tanggaah* [1972] 1 MLJ 207 though the discretion must, of course, be exercised judicially. Adjournments do not always have to be granted. There are other relevant considerations, for example as here, where engaging Counsel at the last minute when there has been ample time for the accused to do so; and the delay and inconvenience to witnesses or co-accused. In the instant case, the refusal to adjourn was not unjustified. In fact Mr. Baru Bian was given an overnight adjournment.

I see no merit in this complaint.

The serious ground is on the admissibility of the appellant's cautioned statement Exh. P10a.

In ruling the cautioned statement admissible, the learned trial Magistrate said:

> ...
>
> (2) No proof of threat, inducement or promise
>
> (3) OKT gave statement voluntarily and failed to establish any threat or inducement or promise at the time of taking statement by Rex Clement. (p. 19 of the appeal record).

With respect the learned trial Magistrate has, in my opinion, misdirected himself. It is established law that the burden of proving that a cautioned statement or a confession was made voluntarily in the sense that its making had not been caused by any inducement threat or promise as stated in proviso (a) (i) of s. 113(1) of the Criminal Procedure Code and s. 24 of the Evidence Act 1950, lies on the prosecution. It is for the prosecution to prove the absence of threat, inducement and promise and **not** for the defence to prove the existence of any of such elements. And, the standard of proof required is that of proof beyond reasonable doubt. *Dato' Mokhtar bin Hashim v. PP* [1983] CLJ (Rep) 101 at p. 112 - 113. Should there be any reasonable doubt as to the voluntariness of the statement in the sense aforesaid, the doubt must be resolved in favour of the accused.

Further, according to the appellant's evidence in the "trial-within-a-trial", PW4 and PW5 assaulted him in a room, he was assaulted because the police wanted him to admit committing the offence. He also said when the 2 policemen assaulted him in the room, Sgt. Voon (PW7) was inside. The learned Deputy Public Prosecutor accepted that prior to Exh. p10a, a statement had been taken from the appellant and recorded by PW7 Sgt. Voon.

On the evidence the appellant was arrested on 22 June 1988. By 28 June 1988 (date of making Exh. p10a), he had given 2 statements, that is, the one to Sgt. Voon (PW7) and Exh. p10a. Owing to the application of the wrong principle governing voluntariness of the cautioned statement Exh. P10A, the learned trial Magistrate's finding of no assault obviously is not sustainable. Assuming there was assault or reasonable doubt that assault existed, even if it took place on the occasion when PW7 Sgt. Voon recorded the earlier statement, it would still be encumbent upon the learned trial Magistrate to direct his mind as to whether the effect or fear caused by the assault had been removed or dissipated when the appellant subsequently gave the statement Exh. p10a. *Lim Sing Hiaw v. PP* [1965] 1 MLJ 85. See also s. 28 of the Evidence Act 1950.

Thirdly, in his judgment on the appellant's case the learned trial Magistrate, in dealing with the cautioned statement said:

> ... Upon careful study of s. 113 Criminal Procedure Code, I am of the opinion whether the content is true or not and whether in answer to a question or not it may be used as a piece of evidence in Court as to incriminate oneself.

With respect I am of the view that the above statement is erroneous. While it is true that when considering the admissibility of a cautioned statement, the trial Court is concerned only with its voluntariness and not the truth or otherwise of the contents therein, once the statement is admitted in evidence, however, the trial Court must examine and consider its weight and value and determine the truth or otherwise of its content before acting upon it. It would be wrong to use it to incriminate the accused as maker thereof if the trial Court is not convinced of its truth. *Chan Wei-Keung v. The Queen* [1967] 2 WLR 553.

Chan Wei-Keung's case dealt with a jury trial. In a summary trial or trial without jury or assessors, the Judge or Magistrate assumes the functions of both the Judge and the jury. The principles are equally applicable.

For the above reasons, I allow the appeal against the conviction and the sentence. It is unnecessary to deal with the other grounds of appeal in any length save saying that as a matter of law, an accused may be convicted on his own confession even if it is retracted, provided the Court is satisfied beyond reasonable doubt of its truth. *Osman & Anor. v. PP* [1967] 1 MLJ 137 approving *Yap Sow Keong v. PP* [1947] MLJ 90; and that as regard the breaking-in of the house, there is some evidence to that effect (see p. 21 of the appeal record); and also that had the appellant's cautioned statement been rightly admitted and was true, there would have been evidence of the commission of the offence between sunset and sunrise.

The appeal is allowed. The conviction is quashed. The sentence is set aside. The fine, if paid, be refunded.

Also found at [1992] 4 CLJ 1865